IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77- **77-1826**

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

CONSUMER PRODUCT SAFETY COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Kaiser Aluminum & Chemical Corporation ("Kaiser") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) has not yet been reported. That opinion reversed a judgment of the United States District Court for the District of Delaware, which was accompanied by an opinion (Appendix C) which is reported at 428 F. Supp. 177. A prior opinion of the District Court in the case (Appendix D) is reported at 414 F. Supp. 1047.

JURISDICTION

The judgment of the Court of Appeals (Appendix B) was entered on March 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did Congress give the Consumer Product Safety Commission the power to regulate as "consumer products" either housing or integral parts of home structures, and thus to preempt existing state and local regulation of housing safety matters?

STATUTORY PROVISION INVOLVED

Section 3(a) of the Consumer Product Safety Act, as amended ("CPSA" or "Act"), 15 U.S.C. § 2052(a), provides, in pertinent part:

> "For purposes of this chapter:
>
> "(1) The term 'consumer product' means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise. . . ."

The full text of Section 3(a) is reproduced in Appendix E.

STATEMENT

In its decision below, the Third Circuit in effect sustained the claim of the Consumer Product Safety Commission ("Commission" or "CPSC") that it possesses authority to regulate as "consumer products" all building

materials used in the construction of residential structures. Although the court below purported to recognize Congress' intention to deny the Commission such authority over residential buildings as a whole (App. A at 5a), it accepted the Commission's arguments that it could regulate both the design and the performance of all "components" of such buildings (App. A at 8a-9a), including the building materials used during the construction process. In so doing, the Court of Appeals supported its reading of the CPSA's language by dismissing as "inconclusive at best" the legislative history (App. A at 10a), which demonstrates that Congress intended to leave untouched the existing state and local system of regulating housing safety through building codes, licensing, and inspections. Instead, the court held that CPSC jurisdiction was justifiable because "design and performance standards for [residential building] components are now a matter of national concern" (App. A at 8a-9a).

This conclusion misreads both the legislative intent underlying the CPSA and the plain language of the statute. The Court of Appeals' ruling, if left undisturbed, will lead to a piecemeal dismemberment of the comprehensive system of state and local control over the design and construction of housing—a system with deep historical roots that Congress has repeatedly sustained [1]—and its replacement by a "consumer product" agency with no expertise in housing matters. Moreover, the decision threatens to impose billions of dollars in liabilities upon home builders and manufacturers of building materials for the retroactive "recall" of housing elements that complied with all applicable state and local building codes in effect at the time the structures were built. Accordingly, prompt review by this Court is necessary to prevent the costly disruption of a long-standing system of state and local regulation.

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[1] *See infra* at 10-13.

The Proceedings Below

This case arises out of the CPSC's assertion of jurisdiction over one important element of the home structure: its "branch circuit" electrical wiring system. Branch circuit wire is made of either aluminum or copper and is used to connect the circuit breakers or fuse boxes to the outlets, switches, or other electrical devices through which electricity is supplied to the home. During the process of home construction, electrical contractors first string the wire within the walls, ceilings, or floors and then connect it to electrical devices, thus creating the branch circuit wiring system. When complete, the electrical system constitutes an integral part of the home structure, much like the floor or the roof (App. A at 3a).

Late in 1973, the CPSC began an investigation of alleged fire hazards associated with certain aluminum branch circuit wiring systems. After the CPSC embarked upon a publicity campaign concerning these alleged hazards,[2] Kaiser—one of several manufacturers of aluminum branch circuit wire[3]—unsuccessfully attempted to convince the Commission that the CPSC's publications were inaccurate, unfair, and seriously damaging to Kaiser's business. In January 1976, Kaiser brought suit against the Commission in the United States District Court for the District of Delaware, invoking federal jurisdiction under 28 U.S.C. §§ 1331(a) and 1337. The action sought to force the Commission to comply with Section 6 of the CPSA, 15 U.S.C. § 2055, which imposes a series of procedural and substantive requirements controlling the CPSC's disclosure of information to the public.

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[2] In its campaign, the CPSC alleged that a fire hazard may arise at the connections between the wire and electrical devices in certain types of aluminum wiring systems (App. D at 3d-7d).

[3] Kaiser neither manufactures nor sells electrical devices, nor does it act as an electrical contractor.

In addition to requesting other types of relief, Kaiser sought to enjoin the Commission's release of information relating to aluminum branch circuit wiring systems. Kaiser contended, *inter alia*, that aluminum wiring systems are not "consumer products" as that term is defined in Section 3(a)(1) of the Act, 15 U.S.C. § 2052(a)(1), and that the Commission thus lacks jurisdiction either to regulate them or to conduct publicity campaigns concerning them. On a motion for preliminary relief, the District Court found that Kaiser had demonstrated a reasonable probability of success on its claim that the Commission lacks jurisdiction over aluminum branch circuit wiring. 414 F. Supp. 1047 (App. D at 1d). After a trial of the jurisdictional issue, the District Court held that aluminum branch circuit wiring is not a "consumer product" under Section 3(a)(1) of the Act, 428 F. Supp. 177 (App. C at 1c), and granted Kaiser appropriate declaratory and permanent injunctive relief.

The Commission appealed, and on March 27, 1978, the United States Court of Appeals for the Third Circuit reversed (App. A at 1a). It is that judgment which Kaiser asks this Court to review.

REASONS FOR GRANTING THE WRIT

A. Certiorari Should Be Granted to Decide an Important Question of Federalism Arising from the Consumer Product Safety Commission's Attempt to Displace State and Local Governments from Their Traditional Role in Regulating Housing Safety.

Housing and building materials have long been subject to a comprehensive system of state and local regulation covering both design and construction.[4] As the court below necessarily conceded, the electrical wiring system

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[4] *See, e.g.*, R. SANDERSON, CODES AND CODE ADMINISTRATION 5-36 (1969); NATIONAL ELECTRICAL CODE (1978 ed.).

is an integral part of the house (App. A at 3a). If the CPSA confers jurisdiction on the Commission to regulate such matters, then Commission standards will preempt all relevant state and local codes.[5] The Third Circuit welcomed this prospect, claiming that design and performance standards for housing "are now a matter of national concern" (App. A at 8a-9a).

This conclusion that the federal government should regulate housing safety is not supported by the relevant legislative materials and is far from obvious as a matter of national policy. Both the expertise and the wide-ranging inspection capability necessary for such a regulatory program currently reside not in the federal establishment, but in state and local governments; the CPSC has admitted that it cannot provide an effective substitute for the state and local enforcement system.[6] Moreover, even if federal intrusion did make sense, the CPSC would hardly be the instrument chosen by Congress, for much greater expertise in the housing area is already available in other federal agencies, such as the Department of Housing and Urban Development ("HUD"). The fact of the matter, however, is that Congress did not claim for the federal government in general, or grant to the Commission in particular, the authority over housing safety that the agency is now attempting to seize.

The decisions of this Court require Congress to speak clearly if it wishes to preempt a comprehensive state regulatory system:

> "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States* v. *Bass*, 404 U.S. 336, 349 (1971) (footnote omitted).[7]

[5] Section 26(a) of the CPSA, 15 U.S.C. § 2075(a), expressly provides that whenever the Commission issues a safety standard that "applies to a risk of injury associated with a consumer product," the CPSC standard will preempt any state or local standard or regulation dealing with the "same risk of injury" (App. A at 8a).

[6] 42 Fed. Reg. 3342 (1977).

It is obvious that the Third Circuit's ruling will work a significant alteration of the federal-state balance in the field of housing regulation. Neither the legislative history of the CPSA, nor the consistent course of Congressional action in the housing safety area, nor the statutory language sanctions such a result.

The Legislative History of the CPSA

The legislative history of the CPSA demonstrates that Congress considered the possibility of authorizing the Commission to regulate housing and the integral parts of home structures, and decisively rejected that course of action. During Congress' deliberations on the CPSA, only once was it suggested that the Act was an appropriate vehicle in which to deal with the complex problems that would necessarily be raised by federal intrusion into the housing safety area.[8] The occasion arose when Senator Eagleton proposed an amendment that would have included mobile homes—and thus their electrical wiring

[7] *See also Ray* v. *Atlantic Richfield Co.*, —— U.S. ——, 98 S. Ct. 988, 994 (1978); *Heublein* v. *South Carolina Tax Comm'n*, 409 U.S. 275, 281-82 (1972).

[8] *See* 118 CONG. REC. 21,898 (1972). The otherwise complete silence of Congress on the question of federal entry into the area of state and local building regulation is itself persuasive evidence that Congress did not intend to use the CPSA as a vehicle through which to involve the federal government in that extremely complex subject. Any legislation defining such a federal presence would require careful drafting to delineate the relationship between the state and local system and any new federal rules.

systems—within the definition of "consumer product." This proposed amendment sparked a lengthy debate, the thrust of which was that mobile homes were a type of housing, and therefore were not "consumer products." At the conclusion of the debate, the Senate formally affirmed this view by voting down Senator Eagleton's proposal.

The Senate regarded the distinction between housing and "consumer products" as critical, in part because housing safety legislation falls under the jurisdiction of the Senate subcommittee specifically charged with developing all types of housing legislation, and that subcommittee had not reviewed the CPSA. The housing subcommittee, in fact, was then considering legislation to deal with mobile home safety in the broader context of legislation giving certain powers and duties to HUD.[9] Accordingly, several Senators indicated that any regulatory authority over mobile homes should be given to HUD under the pending housing bill, since expertise on housing concerns existed there but would not exist within the proposed consumer product agency.[10]

It also became clear during the debate that the Senate simply did not conceive of mobile homes or other types of housing as "consumer products" to be regulated by the new CPSC. Thus, Senator Sparkman reasoned that if Congress were to extend the legislation to mobile homes, "[w]e might as well apply it to single-family dwellings or to apartment houses, or to anything else. . . ." [11] Even more explicit were the remarks of Senator Brock:

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[9] *See* the remarks of Senator Sparkman, Chairman of the Housing and Urban Affairs Subcommittee of the Senate Banking, Housing and Urban Affairs Committee. 118 CONG. REC. 21,898 (1972).

[10] *Id.* at 21,898-900.

[11] *Id.* at 21,898.

> "The fact of the matter is that the Senator's amendment tries to equate a waffle iron with a home. . . . A mobile home looks like a house, functions as a house. . . . [I]f this amendment were to be adopted the [CPSC] would be thrust into an area which relates solely to housing. . . .
>
> "If this amendment were adopted, mobile homes would be the only form of housing contained in this legislation." 118 CONG. REC. 21,899 (1972).

The Senate shared Senator Brock's concern and resoundingly defeated the Eagleton amendment by a vote of 63 to 16.[12]

The House of Representatives also expressed a clear intent to exclude mobile homes from regulation by the CPSC. In explaining this decision, the House Report stated that the definition of "consumer product" was not "so broadly stated as to bring the basic structure of the mobile home within the reach of this legislation." [13] Thus, both Houses of Congress made it clear that the new

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[12] Two years later, Congress did provide for federal regulation of mobile home construction. In the National Mobile Home Construction and Safety Standards Act of 1974, Pub. L. No. 93-383, 88 Stat. 700, 42 U.S.C. §§ 5401-5426, it assigned that regulatory role to HUD, and not to the CPSC. Significantly, the Mobile Home Act specifically includes "electrical systems" within its definition of "mobile home," 42 U.S.C. § 5402(6), thus distinguishing them from "consumer products" such as toasters and television sets.

[13] H.R. Rep. No. 1153, 92d Cong., 2d Sess. 28 (1972).

The Third Circuit's analysis of this legislative history was both extremely brief and predicated upon an erroneous factual premise. Thus, the Third Circuit minimized the importance of the debate on the Eagleton amendment on the ground that it preceded the House Report, which the Court of Appeals erroneously construed as favorable to the CPSC's position (App. A at 9a); in fact, the Senate debate occurred on June 21, 1972, the day *after* the issuance of the House Report. Moreover, as noted above, the House Report's conclusions are actually contrary to those of the Third Circuit.

"consumer product" agency was to have no authority over housing questions. As the District Court noted:

> "Cong ss, in considering the CPSA, seems to have contemplated that the Act would not, at least as a general proposition, preempt state and local building codes. The primary concern of Congress, in fact, appears to have been the filling of *gaps* in existing national/state regulation, rather than the supplanting of local regulation of housing design and construction." 414 F. Supp. at 1059-60 (App. D at 25d).

Federal Legislation Concerning Housing Safety

The legislative history of the CPSA, which carefully distinguishes between "consumer products" and the integral parts of a house, is consistent with Congress' general approach to legislation on housing safety matters. In a number of other recent statutes, Congress has decided to entrust housing to HUD, not the CPSC; to limit HUD to an advisory role, except in certain special situations (such as mobile homes) where federal preemption seems particularly sensible; and to distinguish between housing and "consumer products."[14] These statutes, which the Third Circuit did not discuss, graphically demonstrate the error in that court's unexplained conclusion that Congress gave the Commission the power to supplant state and local regulation of housing safety.

Soon after the CPSA was enacted, Congress passed the Housing and Community Development Act of 1974,[15] which established the National Institute of Building Sci-

[14] Of course, the CPSA's meaning must be examined in light of the language and objectives of other federal statutes that relate to the same general subject matter. *See, e.g., Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

[15] Pub. L. No. 93-383, 88 Stat. 633.

ences ("NIBS"). NIBS' jurisdiction expressly includes the safety aspects of building systems, products, and materials. 12 U.S.C. § 1701j-2(e). Unlike the CPSC, NIBS has no authority to set mandatory federal standards; rather, its role is to develop "nationally recognized performance criteria" for the construction industry, to encourage local authorities to adopt these criteria, and to furnish technical assistance to state and local jurisdictions. *Id.*[16] This policy of favoring an advisory, rather than a preemptive, federal role was further demonstrated that same year when Congress established the National Fire Prevention and Control Administration ("NFPCA").[17] The statute creating the NFPCA explicitly notes that "fire prevention and control is and should remain a State and local responsibility . . .," 15 U.S.C. § 2201(5),[18] and grants only an advisory role to the new federal agency. This deference to state and local regulatory authorities is reiterated throughout the statute, particularly in reference to local building codes. *See, e.g.*, 15 U.S.C. § 2211.[19]

[16] *See* 414 F. Supp. at 1061 (App. D at 27d).

[17] The NFPCA was established by the Federal Fire Prevention and Control Act of 1974, Pub. L. No. 93-498, 88 Stat. 1535, 15 U.S.C. §§ 2201-2219.

[18] As noted above, the alleged problem with aluminum wiring systems is that some systems may give rise to fire hazards under certain conditions.

[19] This policy is reaffirmed in pending legislation concerning the NFPCA. The proposed Fire Prevention Study Act of 1978, H.R. 7684, which has been favorably reported by two House committees, would require the NFPCA—and not the CPSC—to study the "necessity and feasibility of establishing a Federal assistance program to aid State and local governments in the enforcement of their fire prevention codes and/or Federal fire safety and control standards." H.R. Rep. No. 989, Part I, 95th Cong., 2d Sess. 1 (1978). As one committee report notes, however,

> "[a]lthough the bill directs the [NFPCA] to study the feasibility of a Federal fire prevention and control code . . . , the committee wishes to make clear that it is not suggesting that

Even more telling was the Congressional reaction when faced with a safety hazard—lead paint—that occurs in both housing and "consumer product" contexts. In the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. §§ 4801-4846, Congress gave the CPSC responsibility for prohibiting the use of lead-based paint in "any toy or furniture article," but gave *HUD* the authority to prohibit the use of that substance in federally-constructed or assisted housing, and did not purport to give any federal agency the power to regulate lead paint with respect to housing lacking a federal financial nexus. 42 U.S.C. § 4831.

Finally, when Congress enacted the Magnuson-Moss Warranty Act of 1975, 15 U.S.C. §§ 2301-2312, it again distinguished between "consumer products" and structural housing components. During the debate on that legislation, Congressman Moss, a leading proponent of the CPSA, stated that the Warranty Act's definition of "consumer product":

> "would apply to any separate equipment such as heating and air conditioning systems which are sold with a new home. However, *the definition would not apply to items such as dry wall, pipes, or wiring which are not separate items of equipment but are rather integral component parts of a home.*" 120 CONG. REC. 31,323 (1974) (emphasis added).[20]

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such a code would be appropriate. In fact, the committee notes that some of the model codes, and thus the State and local codes which substantially adopt them, are satisfactory. . . . *In view of the traditionally State and local character of fire prevention and control, the committee hopes that Federal involvement in this field can be kept to a minimum.*"

Id. at 4-5 (emphasis added); *see also* H.R. Rep. No. 989, Part II, 95th Cong., 2d Sess. 4, 9 (1978).

[20] A Federal Trade Commission interpretation of the Magnuson-Moss Warranty Act adopts Congressman Moss' approach, stating that such items as "wiring, plumbing, ducts and other items which are integral component parts of the structure" are not "consumer products" covered by the Warranty Act. 41 Fed. Reg. 34,654 (1976). *See also* FTC Advisory Opinion No. 110, 3 CCH Trade Reg. Rep. ¶ 21,245, at 21,140 (1976).

Taken together, these four statutes reflect the long-standing, coherent Congressional policy against displacing the present state and local system of regulating housing design and construction, and give added meaning to the similar Congressional intent revealed by the legislative history of the CPSA.

The Plain Language of the CPSA

This intention is also readily discernible in the language Congress chose to include in the CPSA's definition of "consumer product," for that langauge in no way connotes "housing." Section 3(a)(1) of the Act, 15 U.S.C. 2052(a)(1), permits the Commission to regulate only those products that are: (1) "articles" which are (2) produced or distributed for "use" by a consumer; moreover, that use must (3) occur "in or around a . . . residence." In fact, housing and structural housing components have none of those characteristics.

Neither a house nor the electrical wiring system built into it can logically be called an "article" within the meaning of the Act.[21] When Congress discussed the CPSA, the floor debate made it clear that it intended the Commission to regulate products such as waffle irons or television sets, but not housing.[22] In order to effectuate that intention, Congress used the word "article," a word with a broad, but not a universal, colloquial meaning. One simply would not refer to one's home or home wiring

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[21] *Cf. The Conqueror,* 166 U.S. 110, 115-16 (1897) (construing the word "article").

[22] *See* 118 CONG. REC. 21,845, 21,898-901 (1972); *see also* S. Rep. No. 749, 92d Cong., 2d Sess. 14-15 (1972); H.R. Rep. No. 1153, 92d Cong., 2d Sess. 23 (1972).

system as an "article." Moreover, it makes no sense to say that someone "uses" an integral part of a house "in or around" the house, for one cannot "use" one's house "around" or "inside of" itself.

In its quest to maximize its regulatory jurisdiction, however, the Commission has interpreted the word "article" as a description of the universe of things, and has virtually ignored the rest of the statutory definition.[23] In accordance with its loose reading of the statute, the Commission has asserted that architectural glass, wall board, and even *roofs* are all "articles" and "consumer products" which it may regulate.[24] The Commission has even claimed that a house is an "article," [25] although the agency has not yet claimed jurisdiction over the house as a whole. Whether or not the Commission may properly assert jurisdiction over any particular item used in home

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[23] The Third Circuit purportedly based its decision on the plain meaning of the statutory language, but it ignored the common sense reading of the requirement that a "consumer product" must be "used" by consumers. Aluminum wiring systems, which a homeowner never purchases apart from the house, and never touches, hears, or sees, are not "used" in any ordinary sense of the word. The Third Circuit's response—that a homeowner "uses" the electrical wiring system every time he turns on a light (App. A 6a)—is incorrect, for it takes the word "use" in isolation, and not in the context of the statutory definition and legislative intent as a whole. In fact, the Third Circuit's notion of "use" would apply equally to a house floor, which a homeowner "uses" when he walks, or to a roof, which he "uses" to keep out the rain; such "uses" do not make the house, or the floor, roof, or electrical wiring system thereof, "consumer products."

[24] *See* 42 Fed. Reg. 1428 (1977), *petitions for review pending*, Nos. 77-1216 and 77-1238 (D.C. Cir.) (architectural glass); Record of Commission Action (June 30, 1977), regarding "Whether certain prefabricated panels made of a combination of asbestos and cement used on residences and schools in Puerto Rico are consumer products" (wall board and roofs).

[25] Statement of Mr. Norman C. Barnett, CPSC Solicitor, during oral argument in *CPSC* v. *Anaconda Co.*, Nos. 78-1054 and 78-1070 (D.C. Cir.), on May 5, 1978, Official Transcript at 26.

construction, it is clear that the Commission and the Third Circuit have radically altered both the meaning of the statutory definition of "consumer product" and the scope of the Commission's regulatory powers.

This interpretation, if left uncorrected, will give the CPSC authority over virtually every purported safety issue affecting consumers, whether or not a "product" or an "article" is involved, and whether or not Congress contemplated federal regulation over the type of safety issues involved. Furthermore, this new gloss on the statutory language will replace state and local housing safety regulation with a federal scheme operated by an agency lacking both the skills and the enforcement capabilities required in this very complex area.[26]

The Consequences of the CPSC's Assumption of Authority Over Housing Safety

The Commission has suggested, both in the courts below and elsewhere, that its extremely broad reading of

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[26] The Commission's contention that its mandate extends to everything in the consumer environment—and not just consumer products—is akin to the arguments which have been made in attempts to broaden the range of the federal securities laws. In rejecting one such argument by the Securities and Exchange Commission, this Court recently held:

> "Even assuming . . . that a totally satisfactory remedy—at least from the Commission's viewpoint—is not available in every instance in which the Commission would like such a remedy, we would not be inclined to read [the statute] more broadly than its language and the statutory scheme reasonably permit. Indeed, the Commission's argument amounts to little more than the notion that [the statute] *ought* to be a panacea for every type of problem which may beset the marketplace."

SEC v. *Sloan*, —— U.S. ——, 98 S.Ct. 1702, 1711 (1978). Where a federal agency lays claim to "an awesome power with a potentially devastating impact" on those over whom the power is claimed, only a "clear mandate from Congress" will suffice to sustain the agency's claim. —— U.S. at ——, 98 S.Ct. at 1709.

the CPSA can be accommodated with the basic Congressional policy on housing matters by permitting the CPSC to regulate the design of building materials, but not the manner in which houses are built.[27] But such an artificial division of regulatory authority would make no sense.

First, state and local governments extensively regulate both the design of building materials and the use of those materials in the construction process; such regulation includes detailed controls over electrical wiring systems.[28] CPSC preemption of only one portion of this regulatory system would create chaos since, given the broad scope of the CPSA's preemption provision, *see supra* at 6 n.5, the validity of all types of state and local construction regulation would be placed in serious question.

Second, the Commission's attempt to distinguish between regulating the design of structural housing elements and regulating their construction is simply impracticable, for the quality of building materials and construction techniques are inextricably intertwined. To use an obvious example, a floor beam needs to be made of relatively strong materials if it is to be placed at wide separations from other floor beams, but if the beams were closer together, weaker materials would suffice. The same considerations apply to an electrical wiring system,

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[27] *See, e.g., Aqua Slide 'N' Dive Corp.* v. *CPSC*, 569 F.2d 831, 836 (5th Cir. 1978); CPSC Advisory Opinion No. 259, CCH Cons. Prod. Safety Guide ¶ 43,980 (1978); 41 Fed. Reg. 2742 (1976).

[28] Not only do state and local authorities regulate the licensing of electricians and the construction methods they may employ, *see, e.g.*, NATIONAL ELECTRICAL CODE ("NEC"), art. 300 (1978 ed.), but local electrical codes also prescribe specific safety-related features that electrical equipment must contain and require that electrical equipment must be "approved" by a recognized independent standard-setting body, such as Underwriters' Laboratories ("UL"). *See* NEC, arts. 110-2, 210-7, 336-2 and 410-56. In recent years, UL has in fact adopted special requirements for the wire and devices to be used in aluminum wiring systems. *See* NEC, arts. 110-14, 210-7(G) and 380-14(a)(4).

since the efficiency and safety of the system are dependent both upon the type of materials used and on the way in which electricians fabricate those materials into a system. Unlike the CPSC's proposed scheme, state and local regulation of housing construction can control the entire construction process by balancing the efficacy of different materials with the need for certain defined construction techniques.

Third, the Commission's suggested dichotomy would be meaningless in the context of a "recall" case brought by the agency pursuant to Sections 12 or 15 of the CPSA, 15 U.S.C. §§ 2061, 2064,[29] for in such a case the safety of an *already-integrated* part of the house would be at issue. Although, under the Commission's theory, a state standard would govern the way in which a given part was designed and constructed, the Commission would be free to step in after the fact and require a "recall" of the building materials. The CPSC's action might be based on its unhappiness with the state's design requirements for building materials, which the Commission purportedly could preempt prospectively, but which it might never have addressed in a formal standard. Alternatively, the action might be based on the agency's disagreement with state-mandated construction practices, which the Commission has conceded it cannot supplant. Obviously, such a retroactive federal intrusion into an

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[29] In a civil action under Section 12 or an administrative proceeding under Section 15, the CPSC can demand that manufacturers of allegedly defective consumer products refund the purchase price of the products to consumers, or repair or replace the products. As we discuss below at pages 19-20, the Commission has filed a Section 12 action in the United States District Court for the District of Columbia against 26 manufacturers of aluminum wire and electrical devices, alleging that certain aluminum wiring systems are "imminently hazardous consumer products," and demanding, *inter alia*, that the defendants pay for the "repair" of such systems, even though all of the allegedly defective systems were constructed before the Commission was established.

area so thoroughly covered by state and local law would be neither fair nor justified by any Congressional finding that the intrusion is necessary or otherwise likely to be in the public interest.

In short, given the nature of housing construction and safety problems, a unitary system is much preferable to a division of responsibility between federal, state and local authorities. Had the issue been raised, Congress could conceivably have concluded that federal authority should be imposed over the entire area and the traditional state and local authority preempted entirely. But not even the Commission contends that Congress has ever considered such a solution. Rather, the Commission and the Third Circuit have agreed that Congress has silently and unthinkingly ousted state and local authorities from their responsibility for regulating a significant portion of the housing safety area, has given that responsibility to the CPSC, an agency with no expertise in housing matters, and has left state and local authorities with some uncertain and undefined power over the installation of building materials, which the CPSC is free to second-guess in a "recall" case. The plain language and legislative history of the CPSA, as well as recent federal legislation in the housing safety area, demonstrate that Congress has done no such thing. The Third Circuit's decision thus raises an important issue of federalism that should be decided by this Court.

B. If This Court Is Not Disposed to Grant Certiorari at This Time, Action on the Petition Should Be Deferred Pending Review of the District of Columbia Circuit's Forthcoming Decision on the Same Issue.

If the Court is not inclined to grant immediate review in this case, Kaiser requests that the Court withhold action on this Petition, pending receipt of a petition concerning the forthcoming decision of the D.C. Circuit on

the identical issue of the CPSC's authority over aluminum branch circuit wiring systems.

On October 26, 1977, the Commission filed a Complaint in the United States District Court for the District of Columbia against 26 manufacturers of aluminum wire and wiring devices, alleging that "old technology" aluminum branch circuit wiring systems[30] are "imminently hazardous consumer products" within the meaning of Section 12 of the CPSA, and demanding, *inter alia*, that the defendants pay for the "repair" of such systems. *CPSC* v. *Anaconda Co.*, Civ. No. 77-1843. While all of the defendants strongly dispute the CPSC's factual allegations, most of the defendants, including Kaiser, immediately responded by filing motions to dismiss on two grounds: (a) that the Commission possessed no jurisdiction over aluminum wiring systems; and (b) that the Commission was collaterally estopped from maintaining the action by the District Court's decision in this case. On December 13, 1977, the district court in *Anaconda* granted Kaiser's motion to dismiss on collateral estoppel grounds, but denied the similar motions of the other defendants. 445 F. Supp. 498.[31]

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[30] The Commission's Complaint defines such systems as those constructed between 1965 and 1973.

[31] After the commencement of the instant action, but before the filing of the Complaint in *CPSC* v. *Anaconda Co.*, the Commission issued and served subpoenas upon nearly 50 manufacturers of aluminum branch circuit wire and wiring devices. When many of the companies declined to comply with the subpoenas on the ground, *inter alia*, that the CPSC lacked the requisite jurisdiction, the Commission brought an action to enforce the subpoenas in the United States District Court for the District of Columbia. In June 1977, that court concluded that the Commission had been given jurisdiction over aluminum wiring systems, but also determined that the intervening decision of the District Court here collaterally estopped the CPSC from asserting such jurisdiction against Kaiser. Accordingly, the petition for enforcement was granted as to the other companies, but denied as to Kaiser. *United States* v. *Anaconda Co.*, 445 F. Supp. 486. An appeal from that decision is still pending, No. 77-1628 (D.C. Cir.).

The Commission has appealed the order dismissing Kaiser, and Kaiser's co-defendants have appealed the order denying their motions to dismiss pursuant to 28 U.S.C. § 1292(b). Oral argument in those appeals, Nos. 78-1054 and 78-1070, was heard by the United States Court of Appeals for the District of Columbia Circuit on May 5, 1978.

Anaconda and the instant case thus present identical and substantial issues of federal regulatory policy. If this Court concludes that it ought not to grant certiorari in this matter immediately, then Kaiser asks the Court to hold this Petition until it receives a petition for a writ of certiorari concerning the D.C. Circuit's decision. Such a procedure would ensure that the trial judge in *Anaconda* can accord similar treatment to all defendants on the crucial jurisdictional issue. As the discussion of the *Anaconda* case indicates, the decision in the instant case may have collateral estoppel effects with respect to that litigation. If this Court were to deny Kaiser's Petition, and if the D.C. Circuit were later to rule that the Commission has no jurisdiction over aluminum wiring systems (and be upheld by this Court), the district court in *Anaconda* could conceivably conclude that, by virtue of collateral estoppel principles, Kaiser would be the only one of the 26 present defendants whose product can be regulated by the Commission. The evident unfairness of such a situation can easily be avoided by postponing action on this Petition until the Court has had an opportunity to review the forthcoming D.C. Circuit decision.

CONCLUSION

For the reasons stated above, Kaiser respectfully requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals declaring that the CPSC possesses jurisdiction over aluminum branch circuit wiring systems. In the alternative, Kaiser asks the

Court to postpone action on this Petition until such time as the identical issue is presented to this Court in *CPSC* v. *Anaconda Co.*

Respectfully submitted,

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June 23, 1978